No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

—v.—

STATE OF HAWAII, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF MUSLIM LAWYERS AND OTHER MUSLIM BAR ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1] AND SUMMARY OF ARGUMENT

Amici are associations of Muslim American lawyers and other legal professionals.

Lead *amicus*, the National Association of Muslim Lawyers (NAML), is the premiere national association for Muslim lawyers and legal professionals in the United States. NAML's activities include organizing educational programs on current legal topics of interest, supporting regional Muslim bar associations, and serving the law-related needs of the general public through community service efforts.

Other *amici* are national and regional associations representing Muslim legal professionals from across the country: the Capital Area Muslim Bar Association, the New England Muslim Bar Association, the Muslim Bar Association of Chicago, the Dallas–Fort Worth Muslim Bar Association, the Muslim Bar Association of Houston, the Bay Area Association of Muslim Lawyers, the Muslim Bar Association of New York, and the Association of Muslim Lawyers.[2]

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* and their counsel represent that they have authored the entirety of this brief, and that no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners have filed a blanket consent to *amicus* briefs. Respondents have consented to the filing of this brief.

[2] A fuller description of *amici*'s identities and interests are included in the Addendum to this brief.

As bar associations standing at the intersection of the Muslim American and legal communities, *amici* have been directly affected by the President's promise to ban Muslims from entering the United States and the Executive Order at issue: "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 27, 2017) ("EO-3").[3] As Muslim Americans, *amici* and their members are directly impacted by the President's statements suggesting that their religion is an enemy of the United States. The President's apparent willingness to make laws based on that premise also directly implicates *amici*'s members' professional expertise. As lawyers, *amici*'s members feel a special responsibility within the Muslim American community to respond to the President's official actions and to address for their community the protections afforded to them by the United States Constitution.

As Muslim American legal professionals, *amici* offer the Court their perspective on the question presented as to whether EO-3 violates the Establishment Clause. Under controlling law, governmental action, whether or not in the immigration context, violates the Establishment Clause if it reflects disapproval of a religion rather than a bona fide secular purpose. *Amici* believe that the public statements of the President and his advisors make clear that EO-3 lacks such a bona fide

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[3] Prior versions of the Executive Order are referred to herein as EO-1 and EO-2.

purpose. But if these public statements are not considered dispositive on their face, *amici* invite the Court to consider how they were received by the Muslim American community. To Muslim Americans, the President's clearly stated intention to ban Muslim immigration and the immediate steps he took to carry out this intention raised serious and reasonable concerns about official disfavor of Islam. Policies that create such well-founded apprehension on the part of religious minorities are precisely what Establishment Clause jurisprudence aims to prevent.

ARGUMENT

I. Laws Reflecting Disapproval of Particular Religions Violate the Establishment Clause

The Establishment Clause prohibits governmental action that reflects disapproval of a religion rather than a bona fide secular purpose. Case law makes clear that the history and context of the challenged governmental action is highly relevant to this inquiry.

This Court assesses whether a challenged governmental action violates the First Amendment's Establishment Clause according to the inquiry set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), under which "a court must invalidate a statute if it lacks 'a secular legislative purpose.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (quoting *Lemon*, 403 U.S. at 612). Where the Government's asserted secular purpose is an "apparent sham" or secondary to a predominantly

religious objective, the challenged action cannot withstand constitutional scrutiny. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 865 (2005).

In *McCreary*, the Court explained that "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308). The objective observer must also be familiar with the "specific sequence of events leading to [the act's] passage." *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987). As the Court put it in *McCreary*, "the world is not made brand new every morning" and the objective observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. Here, as laid out in Hawaii's brief and below, history has shown that EO-3 is the latest iteration of an unconstitutional effort to express disapproval of Muslims by disproportionately banning them from entering the United States.

Although the Government and Hawaii differ as to whether this Court's immigration law precedents *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), govern the Establishment Clause question presented here, the Government's expression of disapproval of Muslims is relevant under any view of the case law.

The Government contends that under *Mandel* and *Din*, Hawaii cannot challenge EO-3 under the

Establishment Clause because EO-3 has a "facially legitimate and bona fide reason." Gov't Br. 58 (quoting *Mandel*, 408 U.S. at 770). But this argument assumes the conclusion that the reason provided by the Government is bona fide—and that is the very question in dispute. Moreover, even under *Mandel* and *Din*, where there is an "affirmative showing of bad faith," the Court is permitted to "look behind" the Government's purported rationale. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Whatever the relevance of those precedents, they should not prevent the Court from considering whether there has been an affirmative showing that the rationale for EO-3 articulated in this litigation is different from the actual purpose of the policy as expressed in the public statements of the President and his advisors.

II. There Is Overwhelming Evidence that EO-3 Is Based on Disapproval of Muslims

The public record is replete with evidence—in the form of explicit public statements by the President and his advisors—that the President wanted a Muslim ban, and asked his team to find a "politically correct," i.e., secular, pretext for it.[4]

As far back as 2011, then-businessman Donald J. Trump declared that there "absolutely" is a "Muslim

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[4] Donald J. Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 3:54 AM), https://twitter.com/realDonaldTrump/status/908645126146265090.

problem," based on what he believed to be "tremendous hatred" taught by the Koran.[5] Years later, this belief in a "Muslim problem" became a centerpiece of then-candidate Trump's policy agenda during his campaign for President. In December 2015, he praised an author for acknowledging "Muslim problems."[6] He later declared, "I think Islam hates us,"[7] and clarified during an official Presidential debate that, "I mean a lot of them. I mean a lot of them."[8]

Candidate Trump added further color to his vilification of Muslims throughout his campaign. For example, Trump repeatedly asserted the false claim that "thousands and thousands" of people in New Jersey "where you have large Arab populations"

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[5] David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), https://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches.

[6] Donald J. Trump (@realDonald Trump), Twitter (Dec. 10, 2015, 4:49 AM), https://twitter.com/realDonaldTrump/status/674934005725331456; Donald J. Trump, Twitter (Dec. 10, 2015, 5:00 AM), https://twitter.com/realDonaldTrump/status/674936832010887168; Donald J. Trump, Twitter (Dec. 10, 2015, 5:21 PM), https://twitter.com/realDonaldTrump/status/675123192864899072.

[7] Theodore Schleifer, *Donald Trump: 'I Think Islam hates us,'* CNN (Mar. 10, 2016, 5:56 PM), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us.

[8] *Transcript of Republican debate in Miami*, CNN (Mar. 15, 2016, 3:11 PM), http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text.

cheered as the World Trade Center collapsed on September 11, 2001.[9]

This anti-Muslim rhetoric was not mere sloganeering. Rather, it was backed by a specific policy agenda, beginning with a call for "a total and complete shutdown of Muslims entering the United States"—officially unveiled as a campaign position in December 2015.[10] The Muslim immigration ban was not the only anti-Islam policy that President Trump advocated during his presidential campaign. Candidate Trump promised warrantless domestic surveillance of Muslims,[11] the closing of American

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[9] Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, Wash. Post (Nov. 22, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/?utm_term=.e4a2a64060d4.

[10] Press Release, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://web.archive.org/web/20151208051322/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

[11] Jeremy Diamond, *Trump doubles down on calls for mosque surveillance*, CNN (June 15, 2016, 8:10 PM), http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance.

mosques,[12] and even the eventual registration of all Muslims in the United States.[13]

Pressed for a legal and historical justification for his vision of Muslim exclusion, Candidate Trump cited a chilling precedent: the internment of Japanese Americans during World War II. And when asked directly if he supported internment camps for Muslims during a televised interview in December 2015, Candidate Trump replied that his program would be "no different than FDR," referring to the executive orders issued by President Franklin D. Roosevelt implementing Japanese internment in 1941.[14]

After his election, President Trump set to work to enact his Muslim ban into law. President Trump's advisor Rudolph Giuliani recounted that "when [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together.

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[12] Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015, 6:45 AM), http://www.politico.com/story/2015/11/trump-close-mosques-216008.

[13] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015, 9:27 AM), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716.

[14] Miriam Hernandez, *Trump cites history to defend Muslim immigration ban*, ABC 7 (Dec. 9, 2015), http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396.

Show me the right way to do it legally.'"[15] The eventual result was EO-3, which invokes national security and information sharing as its rationale, the latest in a series of governmental attempts to implement the President's Muslim ban. The President has publicly admitted that the official Executive Orders are a conduit for his true purpose: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[16]

President Trump's consistent pledge to implement a Muslim ban followed by the chaotic release of a travel ban just days into his administration are context enough for an objective observer to infer that the exclusion of Muslims is the true purpose behind President Trump's series of Executive Orders and Proclamations implementing the travel ban. But no such inferences are necessary. The day after EO-1 was signed, Rudolph Giuliani explained on national television that President-elect Trump had invited him to assemble a commission of "expert lawyers" to translate

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[15] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says—and ordered a commission to do it 'legally,'* Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.84671a57ed2c.

[16] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM), https://twitter.com/realdonaldtrump/status/871674214356484096?lang=en.

President Trump's desire for a "Muslim ban" into something that could pass legal muster.[17]

President Trump similarly erased any doubt that the subsequent EO-2 was anything other than a variation on his original pledge to ban Muslims from the United States. After signing EO-2, President Trump described the order as "a watered down version of the first order" and lamented that he could not "go all the way" to do "what [he] wanted to do in the first place."[18] All the while, the President's campaign website continued to call for a "total and complete shutdown of Muslims entering the United States"—a statement that was not removed until several hours after the judges of the United States Court of Appeals for the Fourth Circuit asked Government lawyers about it two months after EO-2 was signed.[19]

EO-3 is the third attempt to enact the Muslim ban that the Trump campaign promised. Just nine days before signing EO-3, President Trump declared that "[t]he travel ban into the United States should

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[17] Wang, *supra* note 15.

[18] Andrew Prokop, *With Trump's new travel order blocked and his health bill flailing, his agenda's in tatters*, Vox (Mar. 16, 2017, 9:20 AM), http://www.vox.com/policy-and-politics/2017/3/16/14935784/trump-achievements-accomplishments.

[19] Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post (May 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/09/trumps-preventing-muslim-immigration-vow-disappears-from-campaign-website-after-spicer-questioned/?utm_term=.85728f2f099e.

be far larger, tougher and more specific-but [*sic*] stupidly, that would not be politically correct!"[20] Given the fact that it shares the same purpose as the previous Executive Orders, it is not surprising that in substance, EO-3 adds little more than window dressing to the original ban. The most significant change is the addition of two non-Muslim-majority countries: Venezuela and North Korea. These additions are plainly pretextual. The restrictions applied to Venezuela impact only a handful of government officials.[21] And the North Korean government does not even permit most of its citizens to travel abroad. Only 52 non-diplomatic U.S. visas were issued to North Koreans in 2016.[22]

In sum, the full history and context leading to EO-3 leave an "'objective observer,'" *McCreary*, 545 U.S. at 862 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308), little choice but to conclude that EO-3 is, at its core, the implementation of President Trump's long-promised ban on the immigration of Muslims to the United States.

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[20] Trump, *supra* note 4.

[21] Kevin Lui, *President Trump Added Three New Countries to his Travel Ban. Here's What to Know About Them*, Time (Sept. 25, 2017), http://time.com/4955280/donald-trump-new-travel-ban-what-to-know.

[22] Hyung-Jin Kim, *Trump's travel ban unlikely to affect North Korea*, PBS (Sept. 25, 2017, 10:15 AM), https://www.pbs.org/newshour/politics/trumps-travel-ban-unlikely-affect-north-korea.

III. The Official Disapproval of Muslims Embodied in EO-3 Gives Rise to Reasonable Apprehension of Persecution on the Part of the Muslim American Community

The members of *amici* Muslim American bar associations are not mere bystanders to the President's displays of anti-Muslim animus and policies, such as EO-3, that embody them. As the target of Government disfavor, the Muslim American community is directly threatened by the present administration's disapproval of their religion. The experience of *amici* and the wider Muslim American community in connection with the successive Muslim bans at issue here illustrates the importance of the Establishment Clause's ban on official actions that reflect disapproval of particular religions. Contrary to the arguments of the Government (Gov't Br. 26-30) and of certain *amici* (*e.g.*, Brief *Amicus Curiae* of the Becket Fund For Religious Liberty in Support of Neither Party, at 6-15), official favoritism or disapproval of religion causes broad-reaching but real harm that can and should be remediable under the Establishment Clause. Here, the President's actions and the anti-Muslim public policy they represent have restricted Muslims' rights, caused alarm and fear, and emboldened the persecution of Muslims by fellow citizens.

Because of the numerous anti-Muslim statements and campaign promises, *amici* and their members were already on heightened alert when President Trump took office. This heightened alert became emergency response all too soon following the release

of EO-1 days after the inauguration. In the days that followed, *amicus* NAML mobilized and coordinated legal aid not only to assist Muslim immigrants, but to provide travel precautions for all Muslims. The impact of the initial travel ban reached every corner of the Muslim legal community, as Muslim legal professionals of all professional backgrounds worked to connect community members with the legal resources they needed to protect their rights.

Since then, the members of NAML and other *amici* have been compelled to marshal their resources to combat the ban's successive iterations. They have diverted time and energy from their usual practices toward educating themselves and protecting colleagues, clients, and community members from the effects of the ban. These effects are not *de minimis*: In the months following the ban, citizens turned to NAML and other *amici*'s attorney networks for advice on the Government's search and seizure authority at the border, how to assist friends or families who had been detained, and explanations of the Government's new vetting and waiver procedures. Clients and colleagues have feared for relatives travelling overseas, altered or postponed their own travel plans, confronted potentially indefinite separation from friends and family abroad, and agonized about whether to participate in religious pilgrimages that required travel to targeted countries. And outside of the immigration context, attorneys are on the front lines assisting community members who have found themselves harassed, attacked, belittled, or ostracized because of their faith.

As attorneys, members of NAML and other *amici* also are keenly aware of the ways in which Government bias and disapproval historically have led to the persecution of members of disfavored groups. With this context, Muslim attorneys perceive acutely the risks to their communities if the President's discriminatory policies are allowed to proliferate unchecked. In the not-so-distant past, bias and animus motivated the Government to corral citizens into internment camps, *see Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an executive order excluding Japanese Americans from certain areas under the guise of national security); preclude access to public institutions, *cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring state segregation of African Americans in education to be unconstitutional); or deny fundamental rights such as the right to vote, *see Davis v. Beason*, 133 U.S. 333 (1890) (upholding an Idaho law banning Mormons from voting). Much like doctors readying for an outbreak, members of *amici*, as Muslim American lawyers, must prepare themselves to protect their community lest the President implement additional policies that target Muslims and curtail their rights.

Like Muslims across the United States, moreover, members of *amici* have experienced persecution at the hands of fellow citizens whose anti-Muslim bias is fomented by Government words and acts. Recent examples of escalating anti-Muslim activity abound. Reported hate crimes against Muslim Americans increased significantly in 2017, as compared to

previous years.[23] Many hate crime perpetrators explicitly invoked President Trump, his policies, or his campaign rhetoric during attacks.[24] State legislatures are considering or have passed "anti-Sharia law" bills that act as thinly veiled expressions of anti-Islam sentiment to combat an imaginary spread of Sharia law.[25] And litigation around the country has ensued when once-welcoming communities organized to exclude or prevent mosques and other Islamic institutions from operating in their cities and towns.[26]

In *amici*'s view, it is not merely a coincidence that these events have occurred concurrent with the Executive Orders at issue. Anti-Muslim activity—violence and crime, anti-Muslim legislation, and organized community opposition to Muslim

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[23] *2017 on Track to Becoming One of the Worst Years Ever for Anti-Muslim Hate Crimes*, CAIR (Oct. 11, 2017), http://islamophobia.org/articles/209-2017-on-track-to-becoming-one-of-the-worst-years-ever-for-anti-muslim-hate-crimes.html.

[24] S. Asian Ams. Leading Together, *Communities on Fire: Confronting Hate Violence and Xenophobic Political Rhetoric* (2018), http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf.

[25] *See Anti-Sharia law bills in the United States*, S. Poverty L. Ctr. (Feb. 5, 2018), https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states.

[26] *See, e.g.*, Charles Toutant, *Bayonne Agrees to $400,000 Settlement of Mosque Suit*, N.J. L.J. (Feb. 1, 2018, 1:33 PM), https://www.law.com/njlawjournal/sites/njlawjournal/2018/02/01/bayonne-agrees-to-400000-settlement-of-mosque-suit (reporting a town's settlement in a case alleging the denial of a zoning variance for a mosque based on religious animus).

institutions—ballooned during and following the 2016 presidential campaign and election. There can be little doubt that the President's anti-Islam rhetoric and actions have motivated and emboldened like-minded American citizens to take action against a religious community that is now the target of official disfavor.[27]

At base, these experiences reinforce Muslims' perceptions that their Government disapproves of their faith and that this disapproval renders them lesser members of the American fabric—the very harm the Establishment Clause was designed to prevent. *Amici* look to this Court to vindicate their belief that no government can trample upon the rights granted to American Muslims by the United States Constitution.

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[27] *See Anti-Muslim Activities in the United States*, New Am., https://www.newamerica.org/in-depth/anti-muslim-activity (last visited Mar. 29, 2018).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

IDENTITY AND INTERESTS OF *AMICI*

The **National Association of Muslim Lawyers (NAML)** is a professional organization dedicated to serving American Muslim legal professionals by promoting professional networking and mentorship among Muslim legal professionals and law students in the United States, supporting the growth of local Muslim bar associations, and serving the general public through volunteerism and community service efforts.

The **Association of Muslim American Lawyers (AMAL)** is a professional organization in the Tri-State (New York, New Jersey, and Connecticut) area. Since its founding in 2005, AMAL has organized and participated in seminars, panel discussions, and old-fashioned community activism, to promote not only the administration of justice, but also an awareness of American and Islamic jurisprudence among minority and immigrant (and especially Muslim) communities in the Tri-State area—all while emphasizing the highest standards of professionalism and integrity.

The **Bay Area Association of Muslim Lawyers (BAAML)** is an organization of legal professionals and law students in the San Francisco Bay Area. It was founded in September 2001, two weeks after September 11, 2001, by a small group of lawyers and law students to respond to backlash discrimination and hate crimes. BAAML improves and enhances the legal profession through serving the educational

and professional needs of Muslim lawyers, legal professionals, and law students, to serve as a legal resource for Muslim communities and others, and to educate and advocate for Muslims and other people regarding their constitutional, civil, and human rights.

The **Capital Area Muslim Bar Association (CAMBA)** is an organization of legal professionals in the Washington, D.C. area. Its mission is to foster a sense of fellowship amongst diverse Muslim legal professionals and to establish an institutional presence within the Capital Area legal community. CAMBA strives to elevate its members to prominence, develop future leaders, and amplify its collective voice to impact legal issues affecting the Muslim community.

The **Dallas–Fort Worth Muslim Bar Association** is a non-denominational, non-political union of attorneys and law students of Muslim faith, open to legal professionals of all faith traditions. It seeks members who wish to serve and protect the constitutional rights of all Americans with a special focus on minority and Muslim American communities, aligning under the Association's banner to give back through community service and pro bono legal work, and to promulgate legal information as an educational tool of social empowerment.

The **Muslim Bar Association of Chicago** is an association of Muslim lawyers, law professors, and law students throughout Illinois. Its mission is to foster the highest ethics, integrity, and honor of the

legal profession while advancing justice for all Americans.

The **Muslim Bar Association of Houston** is an organization devoted to developing and representing the interests of attorneys from the Muslim American community residing in the Houston–The Woodlands–Sugar Land metropolitan area, and providing legal and related services to underserved populations, regardless of faith, both locally and nationally.

The **Muslim Bar Association of New York (MuBANY)** is a member-based professional association serving the educational, professional, and social needs of Muslim legal professionals and law students living and working in the New York metropolitan area. MuBANY is one of the nation's largest and most active professional associations for Muslim lawyers and it provides a range of programs, events, and services for the legal community and the larger Muslim community.

The **New England Muslim Bar Association** was established in 2009 to serve the educational and professional needs of Muslim lawyers and law students in New England and to serve as a legal resource for Muslim communities and others.